STATE OF MICHIGAN

COURT OF APPEALS

FRANK SALO, Plaintiff-Appellant,	UNPUBLISHED April 1, 2014
v	No. 314514 Ingham Circuit Court
KROGER COMPANY and KROGER COMPANY OF MICHIGAN, Defendants-Appellees.	LC No. 12-000025-NO

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Plaintiff was injured when he slipped and fell on a trail of grease on the floor in defendant's store. The trial court concluded that the claim sounded solely in premises liability and that the grease was an open and obvious danger possessing no special aspects making it unreasonably dangerous. We affirm in part, reverse in part, and remand.

Plaintiff was undisputedly a business invitee at defendant's store in January of 2011. While there, he used the restroom and, upon leaving the restroom, proceeded to walk toward the deli section to meet his then-wife. As plaintiff was walking around the deli section, he slipped and fell backwards, landing on his outstretched left arm and hitting his head on an apple rack behind him. He remained on the floor for several minutes before a manager arrived and he was helped onto an electric shopping cart by other shoppers. From his vantage point on the floor, plaintiff observed a trail of grease approximately 25 feet long and three to four inches wide leading from a chicken rotisserie[1] on the deli counter and extending behind him. Plaintiff testified that he could still see the grease trail once he stood up. He clarified that although it was "clearly visible while [he] was on the floor," he could "barely see" it when he was standing.[2]

[1] Defendants contend that the equipment on the counter was a warmer, not a rotisserie. We refer to it as such because plaintiff does so and it is irrelevant to this appeal what it is named.

[2] A party may not create a question of fact by providing an affidavit contradicting earlier deposition testimony, *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993), but plaintiff's deposition testimony only stated that he could still see the

The manager indicated in a written report that she "almost stepped in" the grease, but she did not clarify whether that was fortuitous or because she could see it well enough to avoid it intentionally. Plaintiff described the grease as a "grayish color" and the floor as light-colored or whitish.[3] Defendant stated in response to an interrogatory that "[t]ypically, any chicken grease from the rotisserie chickens would be clear, but yellow in color when warm or hot" and conceded "that chicken grease on a tile floor is slippery."

We review a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). In reviewing a motion for summary disposition under MCL 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party to determine if a genuine issue of material fact exists. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). A genuine issue of material fact exists when the evidence, giving the benefit of reasonable doubt to the opposing party, raises an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013). However, where the evidence fails to establish an issue of material fact, the moving party is entitled to summary disposition as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

We first reject plaintiff's argument that his claim sounds in ordinary negligence, either in addition to or instead of premises liability. A claim based on one theory does not automatically preclude a claim based on an independent theory of liability. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). The open and obvious doctrine applies to premises liability cases but not to cases of ordinary negligence. *Id*. at 489-490. Both causes of action involve a defendant allegedly failing to perform a duty of care owed to the plaintiff. Significantly, the duty owed in relevant part under a premises liability theory is "to exercise reasonable care to protect [an] invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). In contrast, an action sounds in ordinary negligence where a plaintiff is injured because of the negligence of another or another's servant. *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001). Consequently, an action sounds in premises liability when an injury develops because of a condition on the land, rather than from activity or conduct that created the condition. *Woodman v Kera, LLC*, 280 Mich App 125, 153; 760 NW2d 641 (2008) (opinion by TALBOT, J.). "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012).

Here, plaintiff's claim of negligence arises exclusively from a condition of the land. In his complaint, plaintiff asserted that his fall was a "result of the unreasonably dangerous condition on defendant's property." He further asserted that defendant's negligent operation of

grease when he stood up, not that it was "clearly visible" as it was from the floor. We find no contradiction.

[3] The parties have attached what appear to be digital photographs of the area, but they are of poor resolution and have obviously not been color-corrected, so we find them of dubious use.

the chicken warming device "resulted in an unsafe condition on the property that resulted in injury to the Plaintiff." In both circumstances, he acknowledges that the injury directly resulted from a condition of the land, rather than from the negligent conduct of the employees. Even presuming the condition of chicken grease on the floor was caused by defendant's employees, he was injured because of that condition. Therefore, his claim sounds exclusively in premises liability and is subject to the open and obvious doctrine.

Plaintiff also argues that the trial court improperly granted summary disposition on the basis that the danger was open and obvious. The landowner's duty of care does not extend to protecting invitees from dangers that are open and obvious, unless those dangers are effectively unavoidable or pose an unreasonably high risk of harm. *Lugo*, 464 Mich at 516-518. For a condition to be considered open and obvious, a reasonable person of average intelligence must be able to discover the hazardous condition upon casual inspection. *Laier*, 266 Mich App at 498. The test is objective, and not whether a particular plaintiff should have been able to discover the condition. *Lugo*, 464 Mich at 523. Nevertheless, "[t]he duty imposed on invitees to protect themselves while visiting another's property is quite limited: the invitee need only keep a 'casual' look out for dangers that are 'obvious.'" *Grandberry-Lovette v Garascia*, ___ Mich App ___, ___; ___ NW2d ___ (2014) (Docket No. 311668, slip op at p 5).

Even though the test for whether something is open and obvious is objective, the plaintiff's own observations "are entitled to as much consideration by the court as would be the observations of any other witness." *Bialick v Megan Mary, Inc*, 286 Mich App 359, 364 n 2; 780 NW2d 599 (2009). Indeed, little other evidence is available on this record. The grease was apparently plainly visible from the floor, after plaintiff had already slipped and fallen on it, alerting him to the presence of some kind of anomaly underfoot. We can hardly regard this as casual inspection, so it is of nearly no relevance to our inquiry. Likewise, the fact that plaintiff remained able to see the grease, albeit "barely," after standing up is likewise not particularly casual. The fact that the manager apparently detected the grease without being specifically directed to it or having the dubious benefit of a floor-based vantage point is more pertinent, but she would have been specifically looking for something wrong and therefore still was not conducting a casual inspection. Invitees are not obligated to maintain a hyper-vigilant surveillance for subtle clues that a hazard might be lurking in the vicinity. See *Grandberry-Lovette*, ___ Mich App at p ___ (slip op at p 5).

Ultimately, we are persuaded that there is a genuine question of fact whether the grease was open and obvious largely because of plaintiff's testimony that the grease was similar in color to the floor and defendant's apparent concession that it would have been clear when cool. We think it unlikely that defendant would have maintained an ambient temperature in its store high enough to keep the grease "warm or hot." The fact that defendant's manager narrowly avoided the grease is not, without additional context, clearly indicative that the grease was readily apparent or not. As noted, we find the photographs unhelpful. We simply have no evidence before us that casts any light on whether the grease would have been readily apparent on a *casual* inspection, and some evidence suggesting that it would not have contrasted significantly with the floor.

Accordingly, the trial court properly concluded that plaintiff's claim sounded solely in premises liability, but erred in finding that the hazardous condition was open and obvious on the

basis of the record as it presently exists. We therefore reverse and remand. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald